



CENTER FOR  
FOOD SAFETY

November 6, 2018

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667

**SUBMITTED VIA ONLINE SUBMISSION FORM**

**RE: Freedom of Information Act Request**

To the U.S. Environmental Protection Agency (EPA) FOIA Officer:

The Center for Food Safety (CFS) is a 501(c)(3) national non-profit public interest and environmental advocacy organization working to protect human health and the environment by curbing the use of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. CFS, through its Pollinators & Pesticides Campaign, works to protect pollinators, human health, animal health, and the environment from the harm of toxic pesticide use in industrial agriculture including dicamba and its newer iteration XtendiMax. Consistent with CFS's mission and pursuant to 40 C.F.R. Part 2 and the Freedom of Information Act, 5 U.S.C. § 552, CFS respectfully requests the following information:

**Any and all documents, from January 2018 to present, related to any communications between EPA staff and University of Arkansas scientist Jason Norsworthy regarding dicamba, XtendiMax, Engenia or FeXaPan.**

“All documents” includes but is not limited to all correspondence, minutes, memoranda, communications and/or other documents received from or given to other agencies, maps, plans, drawings, emails, reports, databases, and phone notes. This request includes all documents that have ever been within your custody or control, whether they exist in agency “working,” investigative, retired, electronic mail, or other files currently or at any other time.

This request is being sent to the EPA FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

**REQUEST FOR FEE-WAIVER**

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), EPA waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this

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request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii).

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(l)(2), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (i) Whether the subject matter of the request concerns the operations or activities of the government.
- (ii) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (iii) Whether disclosure will contribute to a reasonably broad audience of persons interested in the subject.
- (iv) Whether the contribution to public understanding is significant.

See 40 C.F.R. § 2.107(l). These factors are to be balanced against one another; no one factor is determinative. See *Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

The other requirements in the regulations—related to whether the requester has a commercial interest that outweighs a public interest motivation—are not applicable to CFS and this request. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. See, e.g., OMB Fee Guidelines, 52 Fed. Reg. 10017-18; see also 40 C.F.R. § 2.107(b)(1). Such interests are not present in this request. CFS does not seek information from EPA for commercial gain or interest.

In deciding whether the fee waiver criteria is satisfied, CFS respectfully reminds EPA that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. See 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”). Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

**I. THE PRESENT DISCLOSURE IS IN THE PUBLIC INTEREST BECAUSE IT WILL SIGNIFICANTLY CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF GOVERNMENT.**

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

**A. The subject of the disclosure concerns “the operations and activities of the government.”**

The requested information pertains to EPA’s regulation of pesticides pursuant to FIFRA, 7 U.S.C. § 136 et seq. It is irrefutable that EPA’s regulatory control and oversight of pesticides is a clearly identifiable operation of the government. *See* 40 C.F.R. § 2.107(l)(2)(i). This disclosure will demonstrate to the public at large the nature of EPA’s decision-making process in regards to its registration of XtendiMax, a product that caused unprecedented damage to the nation’s farm season last year.

**B. The disclosure is “likely to contribute” to an understanding of government operations or activities.**

As discussed in the previous section, the present disclosure will provide the public a better understanding of EPA’s regulatory decisions pertaining to the registration, use, and labeling of pesticides generally, and XtendiMax specifically. The requested records will meaningfully inform the public about these government operations or activities in a way not currently available in the public domain. *Id.* § 2.107(l)(2)(ii).

**C. The disclosure will contribute to “public understanding” of a reasonably broad audience of persons interested in the subject.**

This disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the regulation of pesticides. *Id.* § 2.107(l)(2)(iii). CFS is a member-oriented non-profit organization with over 950,000 members that works to address the impacts of the food system on human health, animal welfare, and the environment. Through over a decade of involvement in environmental litigation and policymaking as it relates to food, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public.

CFS educates and counsels the public—via online action alerts, legal action, our website, our True Food Network, books and reports, and our quarterly newsletter, Food Safety Now!—on the harm done to human health, animal welfare, and the environment by industrial agriculture. Accordingly, CFS is an effective vehicle to disseminate information on pesticides and their impacts on pollinators, human health, animal health, and the environment.

**D. The disclosure is likely to contribute “significantly” to public understanding of government operations or activities.**

The disclosure is likely to contribute significantly to public understanding of EPA’s regulatory decisions pertaining to the registration, use, and labeling of pesticides, as compared to the level of public understanding existing prior to the disclosure. 40 C.F.R. § 2.107(l)(2)(iv).

CFS employs science and policy experts who have analyzed FOIA, NEPA, and other environmental and scientific reports for their entire careers. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.<sup>1</sup> More specifically, CFS has been engaged in ongoing efforts to educate our members and the public about the ongoing harms to pollinators, human health, animal health, farmers, and the environment from the toxicity and drift of dicamba and XtendiMax. To that end, disclosure will result in an enhanced public understanding of EPA's regulatory decisions pertaining to the use and labeling of pesticides. This disclosure is particularly relevant as the documents and communications received from Jason Norsworthy will potentially shed light on the agency's decisions surrounding the regulation of XtendiMax.

## **II. OBTAINING THE INFORMATION IS OF NO COMMERCIAL INTEREST TO CENTER FOR FOOD SAFETY.**

The Center for Food Safety is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our food production system on human health, animal welfare, and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on EPA's regulation of pesticides. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from EPA as a result of this request.

Based upon the foregoing, CFS requests that this FOIA be classified within the EPA's fee waiver category and that EPA send the requested information as required by law. As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous please contact me to discuss the proper scope of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink. Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Please send all materials to FOIA@centerforfoodsafety.org. Electronic materials are preferred but if records must be mailed, please send to 303 Sacramento Street, 2<sup>nd</sup> Floor, San

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<sup>1</sup> *See* Publications & Resources, Center for Food Safety, <http://www.centerforfoodsafety.org/reports>.

Francisco, CA 94111. Please call me at 415-826-2770 or email me at ksmith@centerforfoodsafety.org if you have any further questions about this request. Thank you for your attention to this request.

Sincerely,

/s/ Kellan Smith

Kellan Smith

Legal Fellow

Center for Food Safety

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